

QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676 or contact him by e-mail at <kcmdowel@doe.state.in.us>.

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VOUCHERS AND PAROCHIAL SCHOOLS

On June 10, 1998, the Wisconsin Supreme Court, 4-2, upheld a 1995 expansion of the Milwaukee Parental Choice Program (MPCP) that would increase from 1,500 to approximately 15,000 the number of students from low-income families in the Milwaukee Public Schools' area who would be eligible for vouchers to attend a qualifying private school, sectarian or nonsectarian. The 1995 amendments to the MPCP also removed state monitoring and annual performance evaluations. The two significant 1995 changes were to remove "nonsectarian" from the limitation on a participating private school and to make state aid for participating students payable to the "parent or guardian" rather than directly to the private school, as had been the requirement.¹

The 1995 amendments also included an "opt-out" provision, prohibiting a participating private school from requiring any eligible student to participate in any religious activity where the student's parent or guardian has submitted a written request that the student be exempt.

There are 122 private schools in Milwaukee, of which 89 are sectarian. The trial court determined, *inter alia*, that the amended MPCP violated Wisconsin's constitution and invalidated the program. On appeal, the Wisconsin Court of Appeals, by a 2-1 count, affirmed the trial court. Jackson v. Benson, 570 N.W.2d 407 (Wis. App. 1997).

The Wisconsin Supreme Court reversed the Court of Appeals, finding the amended MPCP did not violate either the Establishment Clause of the First Amendment to the U.S. Constitution or the Wisconsin Constitution.² Jackson v. Benson, 578 N.W.2d 602, (Wis. 1998).

Federal Establishment Clause Issue

The court analyzed the amended MPCP, first under the federal constitution and then under the state constitution. For federal review of Establishment Clause issues, the court utilized the "*Lemon* test," a three-part analysis derived from Lemon v. Kurtzman, 403 U.S. 602, 612-613; 91 S.Ct. 2105 (1971). In order to avoid violation of the Establishment Clause, the MPCP:

1. Must have a secular purpose;
2. Must have a primary effect that does not advance or inhibit religion; and

¹The check is still sent to the private school where the "parent or guardian shall restrictively endorse the check for the use of the private school." 1995 Wisconsin Act 27, §4006m.

²There are issues involved in this dispute beyond the church-state issue. This article addresses only the church-state issue, which is the primary focus of the court's decision.

3. Must not create excessive entanglement between government and religion.

The court referred to the *Lemon* test as “the three main evils from which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.” (¶24 at 611-12).

The MPCP had a “secular purpose,” the court determined, because “the purpose of the program is to provide low-income parents with an opportunity to have their children educated outside the embattled Milwaukee Public School system.” (¶26 at 612). The court, in addressing the “primary effect” test, prefaced its findings by noting “that the Establishment Clause is [not] violated every time money previously in the possession of a state is conveyed to a religious institution.” The question is “one of degree.” (¶28 at 612-13). Whether or not a program passes the “primary effect” test depends upon two inquiries: neutrality and indirection. “[S]tate programs that are wholly neutral in offering educational assistance directly to citizens in a class defined without reference to religion do not have the primary effect of advancing religion.” (¶s 29, 33 at 613, 614-15). The court determined the amended MPCP program passes the “primary effect” test because “state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions: (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.” (¶ 41 at 617). The criteria for participation in the amended MPCP is neutral and secular, and without reference to religion. The aid is premised upon legal settlement and income. Eligible students are selected on a random basis. The parents, not the state, “choose the educational opportunities that they deem best for their children.” (¶ 43 at 617-18). Any public aid that “flows to sectarian private schools [occurs] only as a result of numerous private choices of the individual parents of school-age children.” (¶ 45 at 618). In addition, unlike the former program, “the State will now provide the aid by individual checks made payable to the parents of each pupil attending a private school under the program” where such checks “can be cashed only for the cost of the student’s tuition.”³ *Id.* Although most of such checks are likely to be restrictively endorsed to sectarian private schools due to their superior numbers in the Milwaukee Public Schools’ area, the court maintained it would focus “on the money that is undoubtedly expended by the government rather than on the nature of the benefit received by the recipient... The percent of program funds eventually paid sectarian private schools is irrelevant to our inquiry.” (Note 17, at 619).

³The court acknowledged the parents “must restrictively endorse the checks to the private schools,” but denied this was a “‘sham’ to funnel public funds to sectarian private schools.” It is not the court’s function “to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path.” (¶ 46 at 618-19).

Under the third prong of the *Lemon* test, the court found no “excessive governmental entanglement.” Whether or not governmental entanglement is “excessive” is, again, a question of degree. The 1995 amendments to the MPCP actually removed government from a “comprehensive, discriminating, and continuing state surveillance” over the participating sectarian private schools. The only remaining state oversight is in the enforcement of certain legal standards, such as health and safety, which exist already and do not arise solely because of the MPCP. The MPCP “does not involve the State in any way with the school’s governance, curriculum, or day-to-day affairs. The State’s regulation of participating private schools, while designed to ensure that the program’s educational purposes are fulfilled, does not approach the level of constitutionally impermissible involvement.” (§§ 50, 51 at 619, 619-20).

State Establishment Clause Issue

Although the Wisconsin Supreme Court’s majority opinion involved considerable analysis of federal Establishment Clause issues, the trial court and Court of Appeals addressed state constitutional provisions, finding these dispositive without further need to implicate federal law. Article I, §18 of the Wisconsin Constitution is composed of four (4) clauses, which may be described as the “right to worship clause,” “compelled support clause,” “freedom of conscience clause,” and “benefits clause.” The plaintiffs challenged the amended MPCP as violative of the “benefits clause” and “compelled support clause.” Wisconsin’s constitutional provisions are remarkably similar to four Indiana constitutional provisions. The following comparison is instructive.

Wisconsin Constitution

Art. I, §18

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed;

nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent;

nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship;

Indiana Constitution

All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences. (*Art. I, §2, “Natural Right to Worship”*).

No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent. (*Art. I, §4, “Freedom of Religion”*).

No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions or interfere with the rights of conscience. (*Art. I, §3, “Freedom of Religious Opinions and Rights of Conscience”*).

nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

No money shall be drawn from the treasury, for the benefit of any religious or theological institution. (*Art. I, §6, “Public money for Benefit of Religious or Theological Institutions”*).

The court rejected the plaintiffs’ contentions as well as the Court of Appeals’ decision. “[S]ome shadow of incidental benefit to a church-related institution [does not bring] a state grant or contract...within the prohibition” of Wisconsin’s “benefits clause” in Art. I, §18. It is “not whether some benefit accrues to a religious institution as a consequence of a legislative program, but whether its principal or primary effect advances religion.” (¶ 55 at 621). Due to the neutrality of the amended MPCP and the “indirection of state aid,” there is no constitutional infirmity. (¶ 56 at 621).

The amended MPCP, likewise, does not violate the “compelled support clause” because no student is required to attend class at a sectarian school. “A qualifying student only attends a sectarian private school under the program if the student’s parent so chooses.” The court also noted the “opt-out” provision does not “force participation in religious activities” by eligible students at participating sectarian schools. (¶ 66 at 623). (For a related article, see “School Voucher Issues: Milwaukee Parental Choice Program” in **QR** April-June 1996.)

The Wisconsin Supreme Court’s decision relies heavily upon numerous U.S. Supreme Court decisions. However, in Establishment Clause cases from the highest court involving elementary and secondary school students, the stream of thought is neither smooth nor consistent, but is marked by a plethora of concurring and dissenting opinions, often vitriolic, which create legal sandbars and unexpected rapids, leaving in peril any lower court attempting to navigate these waters. Although the following four cases provided the primary support for the majority opinion in Jackson v. Benson, there is at least as much support in the same decisions to support opposite conclusions.

1. Everson v. Bd. of Education of the Township of Ewing, 330 U.S. 1, 67 S.Ct. 504 (1947). New Jersey, by statute, permitted school districts to reimburse parents for the transportation of their children on regular buses operated by the public transportation system.⁴ This reimbursement scheme benefitted parents of public school children and parents of school children who attend nonpublic, nonprofit schools. In upholding the constitutionality of the reimbursement program, the U.S. Supreme Court made the following determinations:

⁴New Jersey statute also permitted public school districts to transport on their own buses certain nonpublic school children who reside along the regular routes for such buses. Indiana has a similar statute. See I.C. 20-9.1-7-1.

- “The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.” 330 U.S. at 6.
- “[I]t does [not] follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program.” 303 U.S. at 7.
- A state “cannot exclude individual...members of any...faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.” 303 U.S. at 16 (emphasis original).
- The Establishment Clause does not require that services be denied to religious institutions where such services are “so separate and so indisputably marked off from the religious function.” The court, by way of example, stated there is no constitutional prohibition against government extending to religiously affiliated institutions “ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks.” 303 U.S. at 17-18.
- The New Jersey “legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” 303 U.S. at 18.

2. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973). New York’s legislature enacted a law that extended maintenance and repair grants directly to nonpublic schools, provided tuition reimbursement grants to qualifying low-income families attending nonpublic schools, and allowed tax credits to other families of nonpublic school children who did not otherwise qualify for the tuition grant. In finding the legislation violative of the Establishment Clause, the court made the following relevant findings:

- When analyzing whether legislation has a secular purpose, does not have the primary effect of advancing or inhibiting religion, and does not excessively entangle government with religion, the court will look to the extent that there is “sponsorship, financial support, and active involvement of the sovereign in religious activities.” 413 U.S. at 772.
- “[T]he fact that [state] aid is disbursed to parents rather than to the [sectarian] schools is only one among many factors to be considered.” 413 U.S. at 781. Where the parent is a “mere conduit,” 413 U.S. at 786, the “Establishment Clause is violated whether or not the actual dollars given eventually find their way into the

sectarian institutions” where legislation creates “incentives to send their children to sectarian schools by making unrestricted cash payments to them...” *Id.* It makes no difference “[w]hether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive effect is the same.” *Id.*

- “In its attempt to enhance the [educational] opportunities of the poor to choose between public and nonpublic education, the state has taken a step which can only be regarded as one ‘advancing’ religion.” 413 U.S. at 788.

3. Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062 (1983). Minnesota legislation permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children (actual expenses for tuition, textbooks, and transportation). The tax deduction is available to parents of students enrolled in public and nonpublic schools, unlike Nyquist, *supra*. In upholding the constitutionality of the law, the court held:

- “Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.” 463 U.S. at 396.
- It is significant that the beneficiaries of the law are “*all* school children, those in public as well as those in private school.” 463 U.S. at 398, *emphasis original*.
- “[P]ublic assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted might not offend the Establishment Clause.” *Id.*, citations omitted and internal punctuation removed.
- While “[i]t is true...that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the [nonpublic] schools attended by their children[.]” Minnesota “has reduced Establishment Clause objections” by “channeling whatever assistance it may provide to parochial schools through individual parents.” Under “Minnesota’s arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children.” 463 U.S. at 399.
- Although the court recognized that the nonpublic schools receiving some “attenuated financial benefit,” 463 U.S. at 400, would be overwhelmingly sectarian, the court refused to find a constitutional infirmity based upon statistics. “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.”

4. Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748 (1986). Although this case addresses a dispute at the post-secondary level, it is instructive

in analyzing the “primary effect” prong of the *Lemon* test. Witters had a progressive visual condition that made him eligible for state vocational rehabilitation assistance for a person who is blind or visually impaired. This state aid was designed, in part, to provide training in “the professions, business or trades” so as to “assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care.” 474 U.S. at 483. Witters attended the Inland Empire School of the Bible where he studied the Bible, ethics, speech, and church administration in order to prepare himself for a ministry profession as either a pastor, missionary, or youth director. The state denied the aid to Witters because of its policy, based upon construction of the state constitution, forbidding “public funds to assist an individual in the pursuit of a career or degree in theology or related areas...” *Id.*

In reversing the Washington Supreme Court, a unanimous Supreme Court (but for various reasons) found the providing of the vocational rehabilitation funds to Witters would not violate the Establishment Clause.

- “It is well settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution.” 474 U.S. at 486.
- “It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in-kind, where the effect of the aid is that of a direct subsidy to the religious school from the state. [Citations omitted.] Aid may have that effect even though it takes the form of aid to students or parents.” 474 U.S. at 487.
- Because the State’s vocational assistance is paid directly to the student, who transmits it to the educational institution of his or her choice, “[a]ny aid...that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” The State’s program is “made available generally without regard to the...nature of the institution benefitted and is in no way skewed toward religion.... It creates no financial incentive for students to undertake a sectarian education. [Citation omitted.] It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions.” 474 U.S. at 487-88.
- Under such an aid program, any “decision to support religious education is made by the individual, not by the State.” *Id.*

HIGH STAKES ASSESSMENT, EDUCATIONAL STANDARDS, AND EQUITY: OCR FLOATS A TRIAL BALLOON

With more than one-half of the states employing graduation and endorsement examinations as a requirement for, or in conjunction with, receipt of a high school diploma,⁵ the Office for Civil Rights (OCR) of the U.S. Department of Education is becoming increasingly involved in investigating complaints alleging discriminatory practices in the administration of the assessment or present discriminatory results based upon past discriminatory practices (i.e., failure to align tests with curriculum, failure to teach subject matter included on tests, etc.). See, for example, “Exit Examinations” in **Updates**, *infra*.

On February 27, 1998, Arthur L. Coleman, Deputy Assistant Secretary of OCR, addressed the National Research Council/National Academy of Sciences Board on Testing and Assessment Colloquium regarding the “intersection between federal law and sound educational policy” in educational reform movements, especially as these relate to the increased use of assessment measures and other tests. His remarks, entitled “Excellence and Equity in Education: Moving from Promise to Reality,” underscored OCR’s possible position that “educational excellence” and “equity” are “mutually dependent goals,” and there cannot be one without the other. Mr. Coleman’s address appears to be more of a “trial balloon” rather than official remarks of OCR. His address does counter recent arguments by commentators and educators who “have argued that the efforts to promote high standards, with the use of high stakes tests, are fundamentally at odds with efforts to ensure that the use of such tests are fair and non-discriminatory.” Mr. Coleman acknowledged there is some “tension” between the promotion of high standards and the ensuring of educational opportunity for all students, but such tension may be only in the short term. The following are statements of particular relevance.

- “Reform efforts that lead to the establishment of higher standards may well magnify, in the short run, performance gaps among different racial or ethnic groups of students in areas where there are already unacceptable performance disparities which, in many cases, reflect the makeup of particular schools.”
- “[T]he world of lawyers [does not] guarantee clarity and precision to a discussion of issues of testing in ways that otherwise elude educators and psychometricians.... [I]t is not a surprise...to find that so many well informed educators, policy makers and—yes—lawyers[,] do not have a clear grasp of the federal law that relates most directly to the use of high stakes tests in education.”⁶

⁵The following states have, at this writing, a graduation or endorsement examination: Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, and Virginia. Wisconsin will have a high school graduation test (HSGT) beginning with the 2001-2002 school year, and require passage of same in the 2002-2003 school year.

⁶Mr. Coleman indicated in his remarks that “high stakes testing” means tests used to base decisions regarding individual students (placement, tracking, receipt of high school diploma). He

- Although policies and procedures may be ostensibly neutral, there still may be a discriminatory effect. The following are considerations for policy makers and educators in ensuring there is no discriminatory effect.
 - a. Does the use of the test result in an “adverse racial impact” where there is a “statistically significant” number of students of one race being denied, in disproportionate numbers, educational opportunities because of the test when compared to students of other races?
 - b. “Is the test valid for the particular purpose used and, if so, are there less discriminatory alternatives that would as effectively serve the educational objectives identified by the school?”
 - c. “Have the students been provided with a fair opportunity to pass the test?” That is, have “the students...been taught what the test purports to measure?”
 - d. Not only must students have a “fair opportunity to learn the material tested[,],...there must be alignment between the material taught and the material tested.”
- Before implementing “standards-based reforms,” a school should address the following questions.
 - a. “What are the educational justifications that support the imposition of high stakes assessments?” Federal courts will generally defer to the educational judgments of school boards so “long as those judgments were deemed reasonable, rational, or not arbitrary.” Some “educational justifications” accepted by courts include:
 - “• Improving the quality of education or schools;
 - Ensuring that high school graduates are competitive nationally;
 - Establishing ‘qualitative achievement standards’ and encouraging academic achievement; [and]
 - Ensuring that a high school diploma is not ‘a meaningless piece of paper.’”
 - b. “What history of racial segregation or discrimination in the state or school district in question exists, and what evidence is there of lingering or continuing effects of any past discrimination?” That is, has the school system in the past utilized a “student tracking [system] that perpetuated...segregation” to such an extent that such affected students have not been provided “a meaningful opportunity to succeed.” In order to avoid a “disparate impact” or “adverse impact on one race versus another[,],... effective monitoring of the racial effects of tests should be part

particularly addressed proficiency tests required for promotion or graduation.

and parcel of any ongoing educational review, so that the questions regarding test objectives and use can be posed against any backdrop that suggests the potential for discrimination against certain students.”

- c. “Will students be subjected to new requirements, such as proficiency exams, the passage of which materially affects the kind of education or educational opportunities the student will receive?” Do the new requirements fundamentally alter the expectations surrounding student performance?
- d. “What period of time has been allowed for students to learn the material being tested, and how long have parents and students had to become familiar with the new requirements?” The “question of timing” is the “central question” upon which courts focus attention, especially where due process implications are involved. There are no “magic rules” dictating how long a period is appropriate “between change in policy and implementation of high stakes consequences...”
- e. “What process guides the implementation of new test requirements to ensure that the ultimate rule for students is not ‘one strike and you’re out’?” That is, “[w]hat kinds of compensatory or ‘front end’ tutorial support is provided to ensure that all students have the same basic and fair opportunity to master the material tested, and over what period of time?” Other considerations include:
 - (1) “Are there multiple opportunities...to take the test?” and
 - (2) “Are waivers of the testing requirements offered and under what circumstances?”
- f. “What is the alignment between the matters tested and the curriculum and instruction? Stated differently, what efforts have been undertaken to ensure that students who are expected to achieve to the new standards have been provided the necessary instruction to give them a fair opportunity to do so?” This question is “the granddaddy of them all,” according to Mr. Coleman. A high school graduation test that covers matters that have not been taught is “fundamentally unfair.” For schools to survive a “fairness” challenge:
 - a. “[T]est objectives and subcomponents [must be] known to teachers...”; and
 - b. “[T]he course curricula [must be] designed specifically to include the material in the test objectives...”

Although Mr. Coleman restricted his remarks to possible disparate impact based upon race, the content of the address could apply to any situation involving alleged discrimination, including ethnic origin, disabilities, and gender.

“PARENTAL HOSTILITY” UNDER INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

(Article by Dana L. Long, Legal Counsel)

In 1991, the Seventh Circuit Court of Appeals issued a decision which caused considerable concern among school districts within the Seventh Circuit. In Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education, 938 F.2d 712 (7th Cir. 1991) the Court found the school district's proposed placement for a student in special education to be inappropriate due to the parents' hostility to the placement. This article will review the Seventh Circuit's decision and examine other cases of parental hostility that have arisen since 1991.

The student in School District No. 21 was first identified as behavior disordered in May, 1986 and was placed in the Student Support Center (SSC). From February of 1987 through the end of the 1988-1989 school year, the student experienced moderate academic progress although his behavior deteriorated. When the student entered junior high school, the school district proposed a placement in the Behavior Education Center (BEC) in the Jack London School. The parents objected to this placement, preferring the SSC at Holmes Junior High School. Deferring to the wishes of the parents, the district placed the student in the SSC. The student's behavior deteriorated rapidly, and he failed all of his first semester classes. The parents withdrew their consent for the district to discipline the student or to provide him with any social services. The district again recommended placing the student at the BEC/Jack London School, but the parents refused. The parents objected to the BEC placement, claiming that the student did not have a behavior disorder; therefore, the proposed placement would not suit the student's needs. The district then requested a hearing.

The Level I hearing officer⁷ agreed with the school district that the student was primarily behavior disordered with a secondary learning disability. Parental actions which impeded the school district's efforts to aid the student's education included: (1) refusal to support services for the student; (2) refusal to supply medical history; (3) refusal to allow detention or quiet lunches to be used as intervention strategies; and (4) making derogatory comments about the school staff in the student's presence, with the effect of undermining the school's educational program. The Level I hearing officer concluded that the student's education could only be accomplished if the parents were not involved on a continuous basis in second guessing the school's disciplinary efforts. The Level I hearing officer ordered the student enrolled, at public expense, in a private residential school. The parents appealed this order, requesting placement either at the SSC/Holmes or at a private day placement closer to home. Id. at 714.

The Level II hearing officer noted the "siege mentality" of the parents and found that the parents had so "poisoned" the placement in the student's mind that there was no reason to expect the district's proposed placement could be successful. Because the residential placement ordered by the Level I hearing officer was not the least restrictive placement, the Level II hearing officer ordered placement in a private day school. Id. The school district appealed to federal district court, which upheld the decision of the Level II hearing officer. Id. at 715.

On appeal to the Seventh Circuit, the school district argued that it was improper as a matter of law for the district court to consider parental hostility in analyzing the educational benefits to be expected from the school's proposed placement. Rejecting this argument, the Seventh Circuit determined that the sole legal requirement is that the Individualized Education Program (IEP) be designed to serve the educational needs and interests of the student. The IDEA does not limit the factors that can be considered so long as they bear on the question of expected educational benefits to the student. The parents' attitudes were severe enough to doom any prospect of educational benefit in the BEC/Jack London placement. Id. at 716. In rejecting the school district's argument that this position would reward intransigent parents, the Seventh Circuit determined that to adopt the school's argument and hold that parental attitudes can never be considered would, in effect, punish the student for the action of the parents. It is the student's interest that must be paramount. Id. at 717.

The decision in School District No. 21 caused many schools to fear an avalanche of cases of claims of parental hostility in an attempt by parents to obtain parental preference in placement decisions. Since 1991, there have been relatively few reported cases concerning this issue. One of these cases arose in Indiana. Roy and Anne A. v. Valparaiso Community School, 951 F.Supp.

⁷Illinois administrative procedures for due process under the Individuals with Disabilities Education Act refer to a "Level I" hearing officer and "Level II" hearing officer, the latter serving in a review capacity. Indiana does not use this terminology. The initial hearing in Indiana is before an Independent Hearing Officer (IHO) under 511 IAC 7-15-5. If administrative review is sought, the appeal is before a three-member Board of Special Education Appeals. See 511 IAC 7-15-6.

1370 (N.D.Ind. 1997) involved a student who had moved to the Valparaiso area in 1992. During the 1992-1993 school year, five case conference committees were convened to address his educational needs. In a May, 1993, case conference committee meeting, the school proposed an IEP for the 1993-1994 school year. The parents took the student out of school and placed him in a private school for the 1993-1994 school year. During the fall of 1994, the parents requested a hearing, seeking reimbursement for the student's education for the 1993-1994 school year and an order continuing the student's placement at the private school for the 1994-1995 school year at public expense. The parents challenged the student's identification and the adequacy of the proposed May, 1993 IEP. The parents also suggested that they were hostile to the school's proposed placement. The Independent Hearing Officer (IHO) and Board of Special Education Appeals ruled in favor of the school, and the parents appealed to federal district court. The district court found School District No. 21 to be inapplicable here. The IHO's findings demonstrated the IHO rejected the idea the parents had opposed the IEP so forcefully as to undermine its prospects for the student. The mother had participated in all five case conference committee meetings, signed in agreement, and did not provide notice that she later came to disagree with the school. The only evidence of hostility the parents presented was their disagreement at the time of the hearing, not in May, 1993, when the case conference was convened. 951 F.Supp. at 1378. Further, in their testimony at the hearing, the parents' expressed disagreement was with the 1993 placement proposed by the school, not the placement ordered by the IHO. The district court found no expressed hostility toward the placement the student received. Id. at 1380.

Greenbush School Committee v. Mr. and Mrs. K., 949 F.Supp. 934 (D.Me. 1996) involved an elementary school student with a learning disability. While the student was in the third grade, the parents requested he be transferred to another school as they believed the administration, teachers, students and even the bus driver at the Dunn school were harassing the student to such an extent that he could not be provided with an adequate education. The school did not agree to transfer him but did provide special tutoring. Shortly after the start of the student's fourth grade year, the parents took him out of school and provided home schooling. By the middle of the spring semester, the parents ceased home schooling and again requested the student be allowed to attend a different public school. The school denied this request, and the parents requested a hearing. At the hearing, the school argued that with a turnover in some school staff (including the principal with whom the parents had disagreements), it was more likely that the school could work cooperatively with the parents to educate the student. The hearing officer concluded that even with staff changes, the long-standing negative feelings of the parents toward the school would negate any beneficial effects of the student's educational program in the same building. The hearing officer ordered the IEP implemented in a different school building. On appeal, the district court upheld the hearing officer's order but found that the hearing officer did not give sufficient weight to the student's testimony. The hearing officer had determined that the student's fears of attending the school were not sufficient to prevent the student from benefitting from his education at the school. The court determined that the student had a gripping fear of the Dunn school that would prevent him from receiving an educational benefit if his educational program were implemented at Dunn. Id. at 943.

Two other federal district courts have recently issued decisions that involved parental hostility. Leslie B. v. Winnacunnet Cooperative School District, 28 IDELR 271 (D.N.H. 1998)

involved a student who had been determined eligible for special education in the categories of emotional handicap (EH) and other health impairment (OHI) due to an attention deficit disorder (ADD). Beginning in the eighth grade, the parents requested an out-of-district placement as the student did not have the social and emotional skills to cope with what the mother perceived to be the ongoing verbal and physical harassment by other students, which involved pushing, shoving, hair pulling, physical fighting and name calling. The parents also believed the school did not adequately implement the student's IEP. The school agreed to place the student at a different school, where she completed the eighth grade. In high school, the student completed the first quarter on the honor roll, and then both her grades and attendance declined significantly. The school re-evaluated the student and dropped the ADD, and consequently the OHI, labels. The parents were dissatisfied with the school's actions and the IEP and removed the student from public school, placing her in a private school where she completed high school. Two hearings were requested by the parents. The first hearing was to address the 1993-1994 IEP for the ninth grade. The hearing officer terminated the hearing because the father refused to control his behavior, which included threatening harm to the school's attorney and witness. The second hearing was to contest the 1994-1995 IEP and the school's classification, which dropped the ADD classification. The hearing officer ruled in favor of the school. In reversing, the district court found that the school had failed to obtain an evaluation for ADD before dropping the label and had disregarded the medical diagnosis of ADD by the student's physician. The court applied the reasoning of the 7th Circuit in School District No. 21 in addressing the breakdown in cooperation between the school and the parents, the deterioration in the relationship between the student and the school leading to the student's lack of trust in the school and a lack of self-esteem, and the student's hostile peer group. The court determined that the school officials' trivialization of the student's complaints as "typical high school kid's stuff" highlighted the school's inability to accommodate the student's needs. The court also determined that the parents were partially at fault in rendering the IEP inappropriate, thereby determining that the school should pay only one-half of the costs of the student's private school.

In Metropolitan Government of Nashville/Davidson County v. Guest, 28 IDELR 290 (M.D.Tenn 1998), the parents of a six-year-old boy with autism challenged the school's proposal for 22.5 hours a week in special education and 10 hours a week in general education for the first grade. For kindergarten, the student had been in a general education classroom full time with a full-time aide and made no or minimal progress. The hearing officer found in favor of the parents, and the school appealed. During the appeal, the school attempted to implement the hearing officer's order, but the mother soon removed the student from school after the school asked her to comply with its visitation policies, which required school visitors to give advance notice and to check in at the office before going to the classrooms. While the district court found both the school and the mother to be genuinely concerned about the child, the mother was hostile towards the school. The court likened the relationship to that of the Montagues and Capulets of Shakespearean fame.⁸ Case conference committee meetings turned hostile with a lot of animosity. The court found it

⁸See also "Court Jesters: The Bard of Education," QR A-J: 97 where another court characterized the litigants-combatants in a similar fashion.

inappropriate for the student to attend these meetings where he would observe the lack of respect shown by his mother to the school. By the time the dispute reached the court, neither party wished the court to affirm the hearing officer's decision. The mother requested a private residential school, although she admitted it was not the least restrictive environment. The court determined the school's proposed IEP was appropriate. However, due to the hostility between the parent and the school, the court determined that the IEP should be implemented at a different elementary school and that officials from the student's previous school should not be involved in future case conference committee meetings.

One other court case that considered allegations of discrimination and, ultimately, parental hostility, involved a student who was eligible under Section 504 but was never determined to be eligible for special education services under IDEA.⁹ The parents' complaint contained a myriad of largely incomprehensible allegations that the court characterized as presenting "in hideous detail minute infractions perceived by K.U.'s parents as retaliation and discrimination against their son" and amounting "to the sum that K.U.'s parents are apparently unsatisfied with their son's educational process and upset that their specific recommendations have not been followed...." K.U. v. Alvin Independent School District, 991 F.Supp. 599, 605 (S.D.Tex. 1998). In dismissing the parents' complaint, the court found that all proper procedures had been followed and that "parents of children in public education are not entitled to determine who gets to teach their children, identify the particular training the teachers or students should receive, or make a determination as to what the child's education should include." Id. at 609.

In addition to the few reported court cases, several state administrative decisions have also addressed parental hostility. In South Roylton Sch. Dist., 27 IDELR 920 (SEA VT 1998) the hearing officer concluded that if the parents' hostility toward the local school is so great that the child could not be satisfactorily educated there, then the child must be placed in another school. Citing School District No. 21 the hearing officer stated "[p]unishing parents for their hostility by forcing a child to attend the local school, or rewarding them by changing the child's placement should not be areas of concern in determining an appropriate placement. The only concern should be the educational benefit to the child." 27 IDELR at 923.

In St. Mary's Sch. Dist., 20 IDELR 46 (SEA PA 1993) the parents disputed a behavior management plan that would have permitted the student to be placed on homebound if she became physically abusive at school. The hearing officer found parental hostility to be relevant to the provision of a free appropriate education but determined that the focus should be on the district's responsibility, not the parent's fault.

In In the Matter of a Child With a Disability, 19 IDELR 86 (SEA NH 1992) the parental hostility

⁹The parents also seemed to allege the school failed to identify the student for services under IDEA. However, prior to this particular lawsuit, the school had requested permission to evaluate the student for services under IDEA. The parents refused permission and the school requested a hearing. The hearing officer denied the school's request to evaluate the student.

was directed not at the student's placement but at a particular member of the student's IEP team. The parents' lack of trust in the facilitator led to their withholding consent for educational services. While recognizing that the student was oblivious to her parents' distrust of the facilitator, the hearing officer found no other way to ensure the parents' right to meaningful participation in the IEP process other than to order the removal of the facilitator from the IEP team.

Parental hostility was directed toward the use of a particular assistive device in Davis School District, 18 IDELR 696 (SEA UT 1992). The hearing officer found the parents' vehement opposition to the devices so tainted the child's mind that the proposals could not be considered to be reasonably calculated to provide an educational benefit.

All of the above reported judicial decisions involving parental hostility arose before the 1997 amendments to IDEA or were appeals of administrative decisions occurring before the effective date of the 1997 amendments and did not address any changes in the law. In IDEA '97, Congress provided for greater parental participation in the decisions affecting the education of students with disabilities and has also imposed greater notice requirements on both parents and the schools that could have implications in future claims of parental hostility. 20 U.S.C. §1414(b)(4)(A) now includes parents on the team that makes eligibility determinations and 20 U.S.C. §1414(f) makes parents members of the group that determines the educational placement of the student. Under the former IDEA, 20 U.S.C. §1414(a)(iii) only required the LEA to provide assurance that its special education program would include the participation of the parents or guardians. The regulations only specifically required parental participation on the team that developed the student's IEP.¹⁰ These two changes, while perhaps designed to increase parental participation and thereby reduce disagreements leading to litigation, will likely have no impact in Indiana as 511 IAC 7-3 *et seq.* (Article 7) already provides for parental participation in eligibility and placement decisions.¹¹

IDEA '97 also includes requirements that the state educational agency (SEA) and the local educational agency (LEA) establish procedures that require parents or the attorney representing the student to provide notice to the LEA or SEA (as applicable) identifying the child, a description of the nature of the problem, and a proposed resolution to the problem to the extent known and available to the parents. 20 U.S.C. §1415(b)(7). This requirement of providing more specificity as to the nature of the problem and a proposed resolution has the potential to resolve disputes short of a hearing. IDEA '97 also requires that mediation be made available, 20 U.S.C. §1415(e), but this was already available in Indiana. See 511 IAC 7-15-3.

20 U.S.C. §1412(a)(10)(C)(ii) provides that if the parents of a child with a disability, who previously received special education, enroll the child in a private school without the consent of

¹⁰34 CFR §§ 300.340 - 300.346.

¹¹511 IAC 7-12-1(j).

the public school, a court or a hearing officer may require the public school to reimburse the parents for the cost of the private enrollment if the public school had not made a free appropriate public education available to the child in a timely manner prior to the private school enrollment. Some limitations are placed upon parents seeking reimbursement for unilateral private placements. 20 U.S.C. §1412(a)(10)(C)(iii)¹² provides that reimbursement may be reduced or denied if the parents did not inform the case conference committee they were rejecting the school's proposed placement and their intent to enroll their child in a private school at public expense, or give such notice in writing at least 10 business days prior to the removal of the child from the public school. In the first Indiana hearing decision applying these new provisions, the school argued that the parents were not entitled to reimbursement for tuition at the private school in which the parents unilaterally enrolled their child. In In the Matter of L.S. and the Nineveh-Hensley-Jackson United School Corp., Johnson County Special Programs, Article 7 Hearing No. 1000-97, L.S. had been found eligible for services for a specific learning disability in the third grade. During the student's third, fourth and fifth grade years there was cooperation and the student progressed despite some disagreements between school personnel and the parents. As the student prepared to enter the sixth grade at the middle school, the relationship deteriorated and communication was curtailed to such an extent that all communication was required to go through the principal. Communication broke down and essential elements of the student's IEP were not implemented. The student began to experience anxiety problems at school and shortly before the end of the 1996-1997 school year, the student "shut down." In August of 1997, the parents enrolled the student in a private school that deals primarily with students with learning disabilities. Finding that the public school's proposed IEP was inappropriate, the IHO ordered reimbursement to the parents for tuition and transportation expenses. While the IHO noted that the parents failed to give the notice required by 20 U.S.C. §§1412(a)(10)(C)(iii), the IHO also noted that the school failed to advise the parents that such notice was required. The school is required to so inform parents under 20 U.S.C. §§1412(a)(10)(C)(iv)(IV) and 20 U.S.C. §§1415(b)(7). On June 17, 1998, the Board of Special Education Appeals (BSEA) upheld this aspect of the IHO's decision, although the BSEA reversed the IHO's determination the private school provided the student an appropriate education.

ACCESS TO PUBLIC RECORDS AND STATEWIDE ASSESSMENTS

As noted in "High Stakes Assessment, Educational Standards, and Equity," *supra*, more than one-half of the states have initiated graduation or endorsement examinations affecting the receipt of a high school diploma. There are a host of problems connected with "high stakes" assessments. One of the emerging areas of concern involves the right of public access to such assessments, especially where short answer or essay questions are employed as a means of assessing student

¹²Reimbursement to the parents may also be reduced or denied if, prior to the parents' removal of the child from the public school, the public school informed the parents of its intent to evaluate the child, but the parents did not make the child available for such evaluation. Additionally, a court may reduce or deny reimbursement upon a finding of unreasonableness with respect to the actions taken by the parents. 20 U.S.C. §1412(a)(10)(C)(iii)(II) & (III).

ability to apply knowledge over several domains. This was one of several issues in Taxpayers Involved in Education, Inc., et al. v. Indiana Department of Education et al., Cause No. 49D03-9509-CP-1357 (Marion County Superior Ct., Room 3, November 30, 1995). Taxpayers involved a suit for injunctive relief to halt the administration of the Indiana Statewide Testing for Educational Progress (ISTEP+) because the plaintiffs allegedly had been denied access to certain items, including piloted essay questions. This position of the plaintiffs was somewhat disingenuous. Some of the requested documents did not and do not exist. Other documents—the essay questions themselves—were protected from disclosure. Indiana’s Access to Public Records Act, at I.C. 5-14-3-4(b)(3), permits the State Superintendent of Public Instruction, at the State Superintendent’s discretion, to except from public disclosure:

Test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

The State Superintendent did permit citizens to view piloted essay questions but only in secured places and after signing nondisclosure statements. Several of the plaintiffs refused to sign the nondisclosure statements and, as a consequence, were not permitted access.

In denying the injunctive relief, the court noted the State had the right under the Indiana Access to Public Records Act to deny access to the essay questions. The Indiana General Assembly, in its 1996 session, created ISTEP-related access rights that were intended to balance public access with the need to ensure test security. Some of these access rights are:

I.C. 20-10.1-16-5.2. The language arts essay scoring rubrics are to be made available to the public at least four (4) months prior to the administration of ISTEP+.

I.C. 20-10.1-16-7(c). Reports of student scores are to be returned to the school districts where the ISTEP+ was administered. These reports are to be accompanied by a guide for interpreting the scores.

I.C. 20-10.1-16-7(d). The school district, after receiving the reports, is to give ISTEP+ scores to each student and the student’s parent or guardian, as well as make available for inspection a copy of the essay questions and prompts used in assessing a student, a copy of the student’s scored essay, and a copy of the anchor papers and scoring rubrics used to score the student’s essays.

I.C. 20-10.1-16-5.5. This created by statute an “ISTEP Program Citizens’ Review Committee,” which had been previously created by the Indiana Department of Education (IDOE). The “Citizens’ Committee” is composed of legislators and other citizens. Its duties include reviewing each essay and prompt, as well as scoring rubrics, intended for use in ISTEP+. The “Citizens’ Committee” has to reach a consensus on each item. The “Citizens’ Committee” is to review anchor papers as the IDOE selects them.

I.C. 20-10.1-16-5.2(1), (2). The essay questions and prompts reviewed by the “Citizens’ Committee” must be taken from textbooks on the State Textbook Adoption List or another source approved by the “Citizens’ Committee.” The essays and prompts cannot “seek or compile” information from students regarding their personal attitudes; political affiliations or views; religious practices or beliefs; family relationships; mental or psychological conditions that may embarrass a student or the student’s family; sexual behavior or attitudes; illegal, antisocial, self-incriminating, or demeaning behavior; critical appraisals of close family members; privileged communications or confidential relationships; or income, except where necessary for eligibility to participate in a program or receive financial assistance.¹³

The need to balance access to public records with test security is beginning to spawn disputes around the country. The following are representative.

1. State ex rel. Rea v. Ohio Department of Education, 692 N.E.2d 596 (Ohio 1998). In a 4-3 decision, the Ohio Supreme Court has determined that Ohio’s Twelfth Grade Ohio Proficiency Test (OPT) and a section of the Ohio Vocational Competency Assessment (OVCA) are “public records” under Ohio law and subject to public access. Rea took both the OPT and OVCA in 1995. Thereafter, she and her father requested access to portions of the two tests. The Ohio Department of Education (ODE) advised the Reas they could have limited access “but only if they executed a nondisclosure agreement, prohibiting them from disclosing the examinations’ contents.”¹⁴ At 599. The Reas refused to do so

¹³These categories are derived from I.C. 20-10.1-4-15(b) which, in turn, is based upon the federal “Protection of Pupil Rights” law at 20 U.S.C. §1232h. In Taxpayers, the plaintiffs expressed concern that essay questions would elicit such responses. One plaintiff testified that he thought the question “What did you do on your summer vacation?” is intrinsically invasive and violative of the state and federal law designed to protect pupil rights. The court rejected this argument, noting that legislative directives require the use of short-answer and essay questions, I.C. 20-10.1-16-5(b)(2), and the short-answer and essay questions are “directly related to academic instruction,” which excepts the questions from application of I.C. 20-10.1-4-15. This same challenge had been made earlier in California when that State sought to implement the California Learning Assessment System (CLAS). California, like Indiana, has a State law similar to the federal “Protection of Pupil Rights” law. The California trial court, as the Indiana Trial Court, rejected the plaintiffs’ assertions that essay questions and related prompts were inherently invasive of the family relationship. The CLAS language arts essays and prompts called “for analysis, articulation, and application” regarding “real life situations” and did not “elicit the type of personal beliefs and practices” to which the plaintiffs object. Greenfield et al. v. Los Angeles Unified Sch. Dist. et al., Case No. BS028375 (Sup. Ct., Los Angeles County, June 9, 1994).

¹⁴As noted *supra*, IDOE also employs a nondisclosure statement. However, it appears Ohio’s public access law is not as definitive as Indiana law in extending discretion to IDOE through the State Superintendent to restrict access to certain test questions. At present, even members of the Citizens’ Review Committee are required to sign nondisclosure statements.

and were denied access.

The majority noted the Reas were seeking access to unmarked assessment booklets, test instructions, and questions, as well as the scoring mechanism for previously administered OPT and OVCA examinations and not prospective examinations. Ohio's public access law is similar to Indiana's law in many respects, especially in defining "public records" and establishing legislative policy. In finding for the Reas, the majority determined there are "tremendous implications for students who take such tests or assessments..." Because these assessment instruments "evaluate students and determine their capabilities, [they] should not be enshrouded in a cloak of secrecy, isolated from the scrutiny and oversight of the general public, concerned parents, and the students themselves." At 602. The court also found, at 603, the use of the nondisclosure statement did not satisfy Ohio public access requirements.

Although parents or the public could view the previously administered tests, the nondisclosure agreement effectively negated any chance that legitimate concerns could be raised through public exposure and debate. It is paramount that such tests are subjected to the keen eye of the public to ensure that the state does not stray from its duty to properly educate Ohio's citizenry.¹⁵

The court did recognize that part of the requested documents were not "public records" but were the property of the private company contracting with the state. In order for a private entity to be subject to Ohio's access to public records requirements, the private entity (1) must prepare the records in order to carry out a public office's responsibilities, (2) the public office is able to monitor the private entity's performance, and (3) the public office has access to the records for this purpose. At 600. The private entity retained its proprietary interest in the documents utilized by Ohio in the administration of its various assessments. As such, the State did not monitor performance of the contractor nor did it have access to the contractor's records for this purpose.¹⁶ At 601.

The majority also based its opinion on recently enacted legislation by the Ohio legislature. Although not effective until 1999, the new Ohio law requires ODE to make public

¹⁵According to one published account, Rea's attorney said his client's motivation was to "see what controversial questions" were on the test. One question to which Rea objected involved the finding of a \$100 bill on the sidewalk. Answer choices included: (1) spending the money at the mall; (2) giving the money to one's poor mother; or (3) finding the owner. "Are they testing honesty or integrity?" Rea's attorney is reported to have asked. "Why are they calling this an academic proficiency test?" School Law News, Vol. 26, No. 10 (May 15, 1998).

¹⁶The contractor with Indiana for the administration of ISTEP+ specifically retains its proprietary interest as a condition of the contract itself.

proficiency tests the year after they have been administered. “As education of its citizenry is one of the most [sic] important functions of the state, the legislature has made clear its intent that parents, students, and citizens have access to these tests in order to foster scrutiny and comment on them free from restraint.” At 601.

The dissenting opinions agreed with ODE that unrestricted use and copying of the OPT would “compromise the current question bank and prevent the development of new questions” because “a certain number of old test questions will always reappear on new versions of the OPT.” At 604. This could lead to widespread cheating and undermine test security. The dissenting opinions expressed the belief the majority exceeded the access requirements under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, as well as the aforementioned Protection of Pupil Rights law.

Both federal laws require that covered materials be made “available” for *inspection*. That was done in this case. Neither federal Act grants a right to obtain personal copies of the materials. Moreover, neither Act prohibits an entity holding the materials from instituting, as a condition of access, a nondisclosure policy to which the party seeking materials must agree.

At 608, Justice Deborah L. Cook, dissenting (emphasis original).

2. Texas Education Agency v. Maxwell, 937 S.W.2d 621 (Tex. App. 1997). This dispute involves the Texas Assessment of Academic Skills (TAAS) and the right of parents under Texas law to view a “true and correct copy of the test after it has been administered and graded.” The TAAS is a statewide test to assess competencies in reading, writing, mathematics, social studies, and science. There is an exit examination version of TAAS, which is part of the requirements for a high school diploma. State law declared the TAAS confidential, but the law was repealed after the trial court had found the state law interfered with the parents’ rights to direct the upbringing and education of their children and had enjoined the administration of TAAS. The trial court stayed the injunction pending this appeal. The Texas legislature has since enacted legislation which requires the release of questions and answer keys to each test administered for the last time during a school year. However, to ensure a valid bank of questions for future use, field-test questions that are not used to compute a student’s scores are not required to be released. Because the legislature repealed the law at issue in the trial, the Texas Court of Appeals determined the issue moot, vacated the injunction, and remanded to the trial court for a determination of reasonable attorney fees for the parents who prevailed at the trial phase.
3. Gabrilson v. Flynn, 554 N.W.2d 267 (Iowa 1996) involves a school board member’s allegations that her school district’s graduation examination, administered during the eleventh grade, was “politically based” and espoused “out-come based educational philosophy.” The Davenport Community School District developed a graduation test to

“measure students’ problem-solving abilities and their competence.” The test was piloted, and samples of the assessment were made available to the public for inspection. Although Gabrilson publicly denounced the test, the majority of the school board did not agree with her. The district copyrighted the test and demanded of Gabrilson that she return materials in her possession. She refused to do so. She also requested the district provide her with any unreleased scoring rubrics and other materials related to the assessment. The school refused based upon Iowa law which exempts from public disclosure materials which are “confidential trade secrets and statutorily protected examinations.” [Indiana’s Access to Public Records Act contains similar exemptions to public disclosure. See I.C. 5-14-3-4.] Gabrilson then distributed the field-tested material she possessed to a radio talk show host and to other media outlets. She also filed this suit to force public disclosure of the assessment. The Iowa Supreme Court made the following determinations: (1) Academic examinations are, by their very nature, confidential even though the examination has been used before and portions were made public. It is reasonable for the district to assert that public disclosure would destroy the objectives of the test.” At 271-73. [For Indiana law regarding confidentiality of test questions, scoring keys, and other examination data, see I.C. 5-14-3-4(b)(3).] (2) Confidentiality of an academic examination is not abrogated upon completion of its administration. It would be “unreasonable and untenable” to compel disclosure after administration because this would force the district to develop a new assessment each year. At 273. (3) A school board member has a fiduciary duty imposed by law and, as such, cannot be denied access to the school district’s graduation examination in her role as a school board member. However, Gabrilson can be—and is—enjoined from copying, disseminating, or publishing the contents of the confidential records. At 276. (4) The school board cannot establish a policy or rule which has the effect of withholding information from minority members of the school board who hold unpopular opinions. At 275-76.

COURT JESTERS: GIRTH MIRTH

One doesn't read much about girdles anymore. One of the earliest references to this garment involves Heracles who, in the performance of one of his Twelve Labors, retrieved the girdle of Hippolyta, the warlike queen of the equally warlike Amazons, a nation of women. Unfortunately, due to the treachery of Hera, Heracles killed Hippolyta during this escapade. While we are admonished to beware of Greeks bearing gifts, we need to be equally vigilant where someone is bearing off with gifts...in her girdle.

A 15-year-old girl was caught shoplifting at Macy's Department Store. She dropped the pilfered items into her girdle and attempted to leave the store. In her subsequent delinquency proceedings, she was charged with shoplifting and with being in possession of a "burglar's tool." The court, in dismissing the latter charge, found the prosecution's argument that a girdle is a "burglar's tool" to be something of a ...well...a stretch. The court acknowledged that this "elastic issue" is one of first impression. Although the prosecution argued that the girl "used her girdle as a kangaroo does her pouch, thus adapting it beyond its maiden form," the defense "snaps back, charging that with this artificial expansion [of New York's penal code], the foundation of [the prosecution's] argument plainly sags." The court, wishing to avoid a "real bind," did not want to "create a spate of unreasonable bulges that would let loose the floodgates of stop and frisk cases with the result of putting the squeeze on court resources already overextended in this era of trim governmental budgets."

Accordingly, the court rejected the prosecution's argument, holding that the girl's girdle was not a "burglar's tool" but "...was, instead, an article of clothing, which, being worn under all, was, after all, a place to hide all. It was no more a burglar's tool than a pocket, or maybe even a kangaroo's pouch." In the Matter of Charlotte K., Age 15, 427 N.Y.S.2d 370, 371 (N.Y. Family Ct. 1980).

QUOTABLE...

"Sometimes common sense prevails, even in the law."

Circuit Judge Ilana Diamond Rovner, in Nationwide Ins. Co. v. University of Illinois, 116 F.3d 1154, 1155 (7th Cir. 1997), also known as the "Foofur" case, affirming that the insurance company was not required through its homeowner's policy to defend or indemnify an intoxicated college student who burned "F-o-o" into the artificial turf of the university's football field, causing \$600,000 in damage. "Foofur," a cartoon character from the 1980s, was the intended word. See 116 F.3d at 1156, note 5, for details of the character "Foofur."

UPDATES

Curriculum and Religious Beliefs

In 1995, the Indiana General Assembly, through P.L. 202-1995, added to the mandatory curriculum statutes a series of “protected writings” that schools could display and students could employ without fear of sanction. The new statute, I.C. 20-10.1-4-2.5, was in response to the perceived sanitizing of public school curriculum of any religious references. There had been a number of such disputes around the country. See, for example, “Choral Music and the Establishment Clause,” **QR** A-J: 96, J-M: 98; “Challenges to Curriculum,” **QR** J-S: 96; “Curriculum and Religious Beliefs,” **QR** J-M: 96; “Evolution v. ‘Creationism,’” **QR** O-D: 96; and “Opt-Out of Curriculum,” **QR** J-M: 96. I.C. 20-10.1-4-2.5 reads as follows:

20-10.1-4-2.5 Protected writings, documents, and records of American history or heritage

Sec. 2.5. (a) This section applies to the following writings, documents, and records:

- (1) The Constitution of the United States of America.
- (2) The national motto.
- (3) The national anthem.
- (4) The Pledge of Allegiance.
- (5) The Constitution of the State of Indiana.
- (6) The Declaration of Independence.
- (7) The Mayflower Compact.
- (8) The Federalist Papers.
- (9) “Common Sense” by Thomas Paine.
- (10) The writings, speeches, documents, and proclamations of the founding fathers and presidents of the United States.
- (11) United State Supreme Court decisions.
- (12) Executive orders of presidents of the United States.
- (13) Frederick Douglas’ Speech at Rochester, New York,

on July 5, 1852, entitled “What to a Slave is the Fourth of July?”.

(14) *Appeal* by Walker.¹⁷

(15) Chief Seattle’s letter to the United States government in 1852 in response to the United States government’s inquiry regarding the purchase of tribal lands.

(b) A school corporation may allow a principal or teacher in the school corporation to read or post in a school building or classroom or at a school event any excerpt or part of a writing, document, or record listed in subsection (a).

(c) A school corporation may not permit the content based censorship of American history or heritage based on religious references in a writing, document, or record listed in subsection (a).

(d) A library, a media center, or an equivalent facility that a school corporation maintains for student use must contain in the facility’s permanent collection at least one (1) copy of each writing or document listed in subsection (a)(1) through (a)(9).

(e) A school corporation:

(1) must allow a student to include a reference to a writing, document, or record listed in subsection (a) in a report or other work product; and

(2) may not punish the student in any way, including a reduction in grade.

A recent case illustrates the continuing difficulty in accommodating religious beliefs within the context of curricular objectives. In C.H. v. Oliva, 990 F.Supp. 341 (D.N.J. 1997), an elementary school student filed suit against his teacher, school, and State department of education, asserting that State policy and practice aided in violating the student’s right to express his religious beliefs. There were two incidents that led to this civil rights lawsuit. The first occurred when the student

¹⁷The *Appeal* by David Walker, referenced at I.C. 20-10.1-4-2.5(a)(14), is the more obscure of the included documents. The full title is *Walker’s Appeal in Four Articles, Together with a Preamble to the Colored Citizens of the World, But in Particular, and Very Expressly, to Those of the United States of America*, published in Boston in 1829. Although written with numerous religious references, the work was mainly concerned with evils of slavery. The *Appeal* calls for violence and revolt and was one of the more influential abolitionist writings. Walker died in 1830. See The Crusade Against Slavery 1830-1860, By Louis Filler (Harper & Row, 1960).

was in kindergarten. The teacher asked the students to make posters depicting things for which they were thankful. The student drew a poster of Jesus. All the posters were displayed in the hallway. One day when the kindergarten teacher was absent, some unknown person removed the student's poster. When the teacher returned, the poster was placed on display again, albeit in a less prominent location than before. The second incident occurred when the student was in the first grade. The teacher rewarded students who reach a certain level of reading proficiency by permitting them to read aloud to the rest of the class a book of each student's choosing. However, the book was subject to review by the teacher to ensure the material was suitable in length and complexity for first grade students. The student chose a story from Genesis in a book entitled *The Beginner's Bible*. The teacher did not allow the student to read the story to the class because of the story's religious content. He was allowed to read the story to his teacher instead, although other students were permitted to read their non-religious stories to the class. In directing judgment for the defendants, the court noted that a classroom and a school are not public forums but non-public forums. "Speech uttered in a non-public forum may be subject to time, place and manner regulations, and these regulations must be viewpoint-neutral and reasonably related to a legitimate governmental purpose." 990 F.Supp. at 352. The court added that First Amendment rights of students in public schools are not automatically coextensive with rights of adults in other settings, particularly given the characteristics of the school environment, citing to Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266; 108 S.Ct. 562 , 567 (1988). "In the context of the classroom," the court added, "the inquiry is more specific: educators may exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 990 F.Supp. at 353 (internal punctuation and other citations omitted). The student had no constitutional right to have his poster of Jesus displayed in any particular location. The relocation of the poster was not a restriction upon the student's speech. *Id.* In addition, no other student was permitted to read aloud stories from their particular faith traditions. The restriction on such readings was to avoid the appearance of the endorsement of any religion by the teacher or other school employees. This, the court found, was "viewpoint neutral" and related to a "legitimate pedagogical concern." *Id.*¹⁸

¹⁸The court reacted negatively to the plaintiff's depiction of these two occurrences as "nothing short of religious cleansing," an exercise of hyperbole referring to the genocide practiced by some combatants in the former Yugoslavia under the euphemism of "ethnic cleansing." At 354.

The court also rejected the plaintiff's demand that the State implement a policy permitting students to express their religious beliefs in their homework assignments, art work, or other class work "free of discrimination based on religious content," and to further prohibit teachers from exercising any editorial control where religious views are "germane to the assignment." The court held: "Public schools are not hostile toward religion. Any student who wishes to say grace over lunch or appeal to divine intervention during a test has that right. Students are also not precluded from expressing their religious views in assignments." At 355. However, the court noted, one does not have the right to express his religious beliefs "through the medium of the public school." Id.

Exit Examinations

For related topics, see "Exit Examinations" in **QR** J-M: 96, O-D: 96, J-M: 97; "High Stakes Assessment," *supra*; and "Graduation Examinations and Reasonable Accommodations," Recent Decisions, 1-12: 96.

1. Georgia Department of Education, 27 IDELR 1072 (OCR 1997). The student claimed the GDOE discriminated against him on the basis of his disability by denying him an equal opportunity to obtain a standard high school diploma. The student alleged the GDOE would not accommodate his learning disabilities in the writing portion of the Georgia High School Graduation Test (GHS GT). In Georgia, in order to receive a standard high school diploma, students must demonstrate competency in English/language arts, mathematics, and social studies. Any student, disabled or nondisabled, who meets all other requirements for graduation except passing the GHS GT receives a "certificate of performance." However, such students can continue to take the GHS GT during its scheduled administrations until they meet the criteria, at which time they receive a standard diploma. The Writing Test is designed and validated in four domains (content/organization, style, written language, and sentence formation), and requires students to write by hand a persuasive essay. Students with disabilities may type their essay or utilize braille, as appropriate. Dictation, however, is expressly prohibited. GDOE allows no exceptions except where a student's physical disability would prevent the student from producing a writing sample. Georgia State Board rules do permit students with disabilities to employ accommodations documented in the respective students' IEPs. The student's teachers, in his instructional program, mapped the structure of an essay or report as a means of enabling the student to organize and express his thoughts. OCR found that GDOE did not violate Sec. 504 or Title II, A.D.A. by denying the student the use of the mapping technique.

The Writing Test was not validated to permit a method of administration which would provide a student a structural framework upon which to construct the requisite persuasive essay.

2. Virginia Department of Education, 27 IDELR 1148 (OCR 1997). A student with autism alleged the Virginia Department of Education (VDOE) discriminated against him on the basis of disability by applying the Virginia State Assessment Program (VSAP) Guidelines for Students with Disabilities in such a fashion as to deny necessary accommodations, resulting in the student not receiving certain subtest scores on the “Stanford 9,” a norm-referenced test used to determine how local student achievement measures with the achievement of students nationwide. The student’s IEP provides that items on reading tests will be read to him, but the VSAP does not permit this accommodation. The VSAP (which is composed of the Stanford 9 tests) is norm-referenced, must be administered under “standard conditions” (given exactly the same way as administered nationwide), is administered to a sample of students, is not used to measure individual student performance, and is not a factor in educational decision making for any student. “The test is designed to measure the overall performance of a school district.” The VSAP Guidelines are intended to promote involvement of students with disabilities. The VSAP Guidelines advise local school districts on the procedures for providing testing accommodations, requisite documentation requirements, and reporting considerations. Determinations with respect to participation, accommodation, or exemption from the VSAP are made by students’ respective IEP teams or Sec. 504 committees. The student in this dispute participated in the VSAP with the accommodations in his IEP (having the reading part read to him). This invalidated his scores on the reading vocabulary and reading comprehension subtests because the student’s “scores would detract from the validity of the comparisons that are the purpose of the tests.” OCR found no violations of Sec. 504 or Title II, A.D.A. VDOE “is not denying your son a benefit or service, since the VSAP is not used for educational decision making.” OCR also noted the parent had been advised in the IEP committee meeting the reading accommodation would invalidate the scores, had been provided the opportunity to waive the student from participation, have the student utilize a permissible accommodation, or provide the particular subtests utilizing an alternative testing instrument. The parent declined all offers.

Bible Distribution

QR January-March: 1995 contained a report of the holding in Berger v. Rensselaer Central Sch. Corp., 982 F.2d 1160 (7th Cir. 1993), *cert. den.*, 508 U.S. 911, 113 S.Ct. 2344 (1993), which found unconstitutional the distribution of Gideon Bibles in public schools by the Gideon International organization. In the Berger case, the distribution occurred in the public schools to fifth grade students. This was preceded by a school assembly. The distribution of Bibles continues to generate controversy. The following are recent cases.

1. Peck v. Upshur County Bd. of Education, 941 F.Supp. 1465 (N.D. W. Va. 1996). Although the school district had in the past allowed outside organizations, including the Gideons, to distribute literature and Bibles in the school, in 1991 it developed and implemented the following policy:

Since the public schools must remain neutral concerning matters of particular religious and political beliefs, the Upshur County Board of Education hereby affirms that the following types of materials shall not be distributed to students in the Upshur County Schools:

1. Materials advocating a particular religion, denomination, or the beliefs thereof;
2. Materials advocating the views of a particular political party or candidate for any elective office.

At the same time, the Board affirms that, in the unrestricted pursuit of knowledge, in the study of literature, history, the arts, and the great thinkers of all ages, religious and political ideas and works should be explored in the context of learning from an unbiased point of view. Materials relevant to such learning should be contained within school libraries at levels appropriate for students' study and understanding of such materials in an academic context. In the event that schools conduct mock political elections, care must be exercised that if posters or other campaign materials or political parties or particular candidates are posted in the school, all parties and candidates on the ballot receive equal exposure. If mock elections are conducted, the results must not be announced until after the actual election is over.

The school board received a request from a number of people that Bibles be made available for students for their personal use should they so desire. A school board meeting attracted over 500 people. Two state senators also urged the school board to permit the availability of Bibles.

The school board decided that permitting religious materials, including Bibles, to be "made available" in its schools during the school day would not violate the school board's policy prohibiting "distribution" of such materials. This was accomplished by designating a table in each school building where the Bibles or other materials would be left. No one supervised the table. A sign at the table read: "Please feel free to take one." The court upheld this procedure, finding that the limited purposes for the distribution of Bibles balanced constitutional interests of the free speech of private citizens (in this case, private religious speech) with governmental neutrality toward the exercise of such speech, neither endorsing nor inhibiting same. Governmental neutrality was further demonstrated by the creation of a nonpublic or "limited purpose" forum to which selective access was not a mere formality and for which such "limited purpose" forum was related to the educational mission of the school.

2. Tuma v. Dade County Public Schs., 989 F.Supp. 1471 (S.D. Fla. 1998). Tuma was considered a talented and caring art teacher. Nevertheless, she was terminated from her teaching position for continuing insubordination. Although cautioned concerning these activities, Tuma continued to distribute Bibles to some of her students, place religious posters in her classroom, talk to students about praying, and write personal letters to

faculty and administrators. She initially refused a medical examination, and later stopped participating in the Employee Assistance Program (EAP) she attended for counseling. The court upheld her termination.

3. Chandler v. James, 985 F.Supp. 1094 (M.D. Ala. 1997); Chandler v. James, 985 F.Supp. 1068 (M.D. Ala. 1997). This is a continuing dispute in Alabama over a host of Church-State issues, including school prayer, Bible study, and Bible distribution. In this latest round, the court found unconstitutional the school's practice of permitting Gideons International to distribute Gideon Bibles to public school students in their classrooms following a presentation. Citing to Berger, the court noted that judicial opinions "have uniformly held that school officials are prohibited from permitting outside groups and individuals to distribute Bibles and other religious literature to students on public school property." 985 F.Supp. at 1101. The "critical factors" include (1) distribution by non-school persons of religious materials/Bibles during a school day on school property, irrespective of location, creates (2) a sense that one is being compelled to accept the religious material/Bible, in part because (3) the public school, a governmental entity, endorses the presence and activities of the non-school persons. 985 F.Supp. at 1102. The keys seem to be the presence of non-school people and the "distribution" of materials. These are absent in the Peck case, *supra*. The Alabama governor sought to invoke a rare direct review by the U.S. Supreme Court, circumventing the Circuit Court of Appeals. However, the Supreme Court recently denied review.

Date

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